Supreme Court Issues Historic Decision on President's Recess Appointment Power

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President Barack Obama's three recess appointments to the National Labor Relations Board in January 2012 were invalid, the U.S. Supreme Court has held unanimously in a much-anticipated, blockbuster decision on the President's authority to make recess appointments to government agencies. *National Labor Relations Board v. Noel Canning, et al.*, No. 12-1281 (June 26, 2014).

While the Court affirmed the judgment of the U.S. Court of Appeals for the D.C. Circuit in *Noel Canning v. NLRB et al.*, 705 F.3d 490 (D.C. Cir. 2013), striking down the President's appointments of Sharon Block, Richard Griffin and Terence Flynn made during a three-day Senate recess in January 2012, it took a more lenient view than had the D.C. Circuit Court of Appeals about when recess appointments are permissible under the Recess Appointments Clause of the U.S. Constitution.

In an opinion concurring with the Court's judgment, Justice Antonin Scalia, joined by Chief Justice John G. Roberts, Jr., and Justices Clarence Thomas and Samuel A. Alito, would have further limited the President's authority to make recess appointments. Justice Scalia concluded that intra-session recess appointments automatically should be invalid, and only vacancies that arise during an inter-session recess properly could be filled by the President.

Background

The Board, with two sitting (confirmed) members and three purported recess appointees (Sharon Block, Richard Griffin and Terence F. Flynn), had issued an unfair labor practice decision against the company (ruling the company had unlawfully refused to execute a collective bargaining agreement to which it had agreed with a labor union). The company appealed the Board's ruling to the U.S. Court of Appeals for the D.C. Circuit, raising for the first time the constitutionality of the three recess appointments. It contended the Senate was not in recess when President Obama named the three recess-appointed Members to the Board on January 4, 2012, and therefore, he did not have authority to make such appointments.

The U.S. Constitution provides two ways that vacancies to agency posts may be filled. The primary method involves a president submitting a nominee's name to the Senate for its "advice and consent" to such nomination. The Constitution secondarily provides for so-called recess appointments — "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

At issue in *Noel Canning* was the historically significant question of under what circumstances the President has the authority to make recess appointments under the latter provision.

Supreme Court Decision

The Supreme Court explained it would consider three questions in its decision. First, did the scope of the words "Recess of the Senate" in the Constitution apply only to inter-session recesses (breaks between formal sessions of Congress) or did it also apply to intra-session breaks ("breaks in the midst of a session"). Second, what is the scope of the phrase "Vacancies that may happen" — does that phrase apply only to vacancies that first arise during a recess or also to vacancies that arise before a recess and continue to exist during a recess? Third, how is the length of a recess calculated — does it include intermittent *pro forma* sessions, such as occurred during the intra-session recess in question?

The President has the right to make recess appointments both inter- and intra-session, said the majority opinion authored by Justice Stephen G. Breyer, to which Justices Anthony Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan joined. In addition, the Court held that the recess

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appointment power applies both to vacancies that first arise during a recess and those that arise before a recess and continue to exist during a recess.

Finally, the Court decided that in calculating the length of a recess, *pro forma* sessions cannot be ignored so the recess is treated as one longer recess rather than a series of brief recesses "punctuated by 'pro forma' session[s]." The Court also held that "it is the Senate that decides when it is in session by retaining the power to conduct business pursuant to its own rules" and that a recess of less than 10 days "is presumptively too short" to permit the President to make a recess appointment, except in "unusual circumstances," such as a "national catastrophe."

Based on its answer to the third question, the Court invalidated the NLRB appointments: "[W]hen the appointments before us took place, the Senate was in the midst of a 3-day recess. Three days is too short a time to bring a recess within the scope of the [Recess Appointments] Clause. Thus we conclude that the President lacked the power to make the recess appointments here at issue." According to the Court, Senate breaks of three days or less are not recesses covered by the Clause; Senate breaks of four days to less than 10 days are presumptively not covered, but that presumption can be rebutted in unusual circumstances.

At the time the Board issued its unfair labor practice decision against *Noel Canning* company (that the company had unlawfully refused to execute a collective bargaining agreement to which it had agreed with a labor union), it had two sitting (confirmed) members and three purported recess appointees (Sharon Block, Richard Griffin and Terence F. Flynn). Noel Canning appealed the Board's ruling to the U.S. Court of Appeals for the D.C. Circuit and raised for the first time the question of the constitutionality of the three recess appointments. It contended that the Senate was not in recess at the time President Obama named the three recess-appointed Members to the Board on January 4, 2012, and therefore, he did not have authority to make such appointments.

The D.C. Circuit held that Members Block, Griffin and Flynn were not properly named to the Board for different reasons than that raised by the company. The Court of Appeals decided the appointments were invalid because they had occurred during an intra-session recess and the Constitution's recess appointments provision does not apply to intra-session recess appointments. In addition, two judges of the three-member panel said that the constitutional authority to fill vacancies applies only to vacancies that "happen" or open up during a recess.

Noel Canning is a "blockbuster" decision from a constitutional perspective. It clarifies the recess appointment quagmire and makes it harder for the President to make recess appointments in the future. It also will result in significant additional work for the NLRB immediately.

Noel Canning likely will result in the denial of enforcement of many Board decisions. However, the impact of the decision is significantly lessened for those cases because the NLRB now has a properly constituted and confirmed full Board. Indeed, on the release of *Noel Canning*, NLRB Chairman Mark Gaston Pearce stated, "[The Board is] committed to resolving any cases affected by today's decision as expeditiously as possible." That may mean that as happened in connection with the *New Process Steel* decision, the current Board will move swiftly to reconsider all of those decisions and essentially reconfirm them — the composition of the current Board is not unlike the composition of the Board that decided the cases that are now under question. (For details of *New Process Steel*, see our article, Supreme Court Rules Labor Board Had No Authority to Issue Hundreds of Decisions.)

There are numerous additional areas of impact to consider. For example, the decision will make it very difficult for the President to make recess appointments because the Court has given the Senate wide latitude in deciding when it is and is not in recess. Moreover, the Board's need to review the many now-invalid decisions could delay several NLRB initiatives. We *do not* believe that this will delay the NLRB's issuance of a final "accelerated election" rule. However, the Board will have to manage its resources by prioritizing whether it has the time to quickly move forward on other cases, such as the NLRB's review of employee use of employer e-mail (*Purple Communications, Inc.* (Cases 21-CA-095151; 21-RC-091531; and 21-RC-091584)) and the Board's joint employer standard (*Browning-Ferris Industries* (Case 32-RC-109684)). The ruling also could delay (but not change) any decision in the controversial Northwestern University athlete-as-employee case.

In light of the decision, employers should review with labor counsel whether *Noel Canning* has an impact on any pending or potentially affected prior cases (e.g., those on appeal).

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